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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WAYNE FISHBACK et al.,

Plaintiffs and Appellants,

v.

COUNTY OF VENTURA,

Defendant and Respondent.

2d Civil No. B235062
(Super. Ct. No. CIV 244304)
(Ventura County)

COUNTY OF VENTURA,

Plaintiff and Respondent,

v.

WAYNE FISHBACK et al.,

Defendants and Appellants.

2d Civil No. B235828
(Super. Ct. No. 56-2009-00354044-CU-
MS-SIM)
(Ventura County)

These two consolidated cases concern solid waste regulations.

In the first case, plaintiffs Wayne Fishback and Carol Fishback filed a federal civil rights action against the County of Ventura (County) in which they challenge the County's waste management actions on their property. They seek damages, declaratory and injunctive relief. (42 U.S.C. § 1983, hereafter "section 1983".) They also filed petitions for writs of administrative mandamus (Code Civ. Proc., § 1094.5) to

review decisions of a hearing officer and the California Integrated Waste Management Board (CIWMB) on whether they were subject to solid waste regulations (Case No. CIV 244304) (the first case).¹ The Fishbacks appeal the judgment in favor of the County.

In the second case, the County sued the Fishbacks alleging causes of action for declaratory, injunctive relief, and civil penalties relating to its enforcement of a "Corrective Action Order" to remove materials from the Fishback property (Case No. 56-2009-00354044-CU-MS-SIM) (the second case). The Fishbacks appeal from a minute order granting summary adjudication for declaratory relief.

In the first case, we conclude, among other things, that: 1) the Fishbacks failed to exhaust their judicial remedies when they dismissed their administrative mandamus actions (§ 1094.5); 2) these dismissals collaterally estop them from raising issues that were decided, or could have been decided, in the mandamus actions; but 3) the trial court erred in dismissing the Fishbacks' section 1983 action on res judicata/collateral estoppel grounds for those claims that did not exist when their mandamus actions were filed.

In the second case, we conclude the minute order granting partial summary adjudication is not appealable. We reverse the judgment in the first case and dismiss the appeal in the second case.

FACTS

The Fishbacks own undeveloped land in Ventura County near the Los Angeles county line. In March 2005, they "allowed material from construction sites," dirt, "stucco, brick, fully cured concrete and asphalt" to be "deposited on [their] property."

On May 11, 2006, the Ventura County Environmental Health Department, through its "local enforcement agency" (LEA) for solid waste compliance, issued a cease and desist order (CDO). The LEA charged that: 1) Mr. Fishback was "conducting solid waste disposal activities without a solid waste facility permit in violation of . . . Public

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

Resources Code . . . Sections 44001 and 44002(a)," and 2) he was receiving "truck loads of inert debris solid waste." It ordered him to "cease all on-site activities for which a solid waste facility permit is required," "cease the acceptance of any solid waste and fill material onto the subject property," and "cease disposal of any solid waste and fill material." It advised him of his right to request a hearing to challenge the CDO.

Mr. Fishback appealed and appeared before a County hearing officer. He claimed that: 1) he was "reusing, recycling or diverting construction" material "for hillside stabilization on his property" and consequently it was "not solid waste"; 2) he was "exempt" from solid waste disposal permit requirements; and 3) he was subject to "disparate treatment" by County officials. The hearing officer upheld the CDO and found that: 1) Fishback "is disposing . . . solid waste on his property," 2) he must obtain a "solid waste Disposal permit from the LEA," and his discriminatory treatment claim was "not relevant." He advised Fishback that he could appeal the decision by "filing a writ of mandate pursuant to section 1094.5 of the Code of Civil Procedure."

On October 19, 2006, the Fishbacks filed a petition for writ of mandate (§ 1094.5) and complaint for damages, declaratory and injunctive relief against the County (Case No. CIV 244304). They claimed the hearing officer erred in finding their "hillside stabilization work to [be] the same tier as a municipal dump." They requested the trial court to "vacate" the CDO to allow them to continue "erosion control work without" a permit, and to prevent County officials from issuing violation notices or designating their property as "an illegal solid waste facility."

The Fishbacks also filed an administrative appeal of the hearing officer's decision to the CIWMB board. On January 22, 2007, the CIWMB board affirmed the hearing officer's decision. It found that as of May 11, 2006, the material that had been delivered to the Fishbacks' property was "Type A inert debris" and "solid waste" as defined in Public Resources Code section 40191. It upheld the CDO and ordered the Fishbacks to comply with it. But it added, "In upholding the [CDO], the Board Members are not denying Fishback the right to show he is not a disposal site" The board

ordered the "LEA to review any information that Fishback submits to show that his activity" is exempt from a solid waste permit requirement.

On February 20, 2007, the Fishbacks filed a petition for writ of mandate (§ 1094.5) complaint for injunctive and declaratory relief against the CIWMB board. They requested a peremptory writ of mandate: 1) to "vacate" the CDO, 2) to let them continue erosion work without a permit, and 3) to prevent the board from issuing "notices of violation" or "notices of non-compliance."

On April 23, 2008, the Fishbacks dismissed their petition for writ of mandate against the CIWMB board.

On November 14, 2008, the Fishbacks filed a first amended complaint for damages and declaratory relief alleging violations of the federal Civil Rights Act (42 U.S.C. § 1983) by the County in Case No. CIV 244304. This had the effect of dismissing their section 1094.5 petition to review the hearing officer's decision.

In their section 1983 action, the Fishbacks claimed County agents conspired to violate their 14th Amendment due process rights and failed "to follow honest governmental process." They alleged that from May 2005 to November 2006, County officials subjected them to unlawful enforcement actions, violation notices and cease and desist orders based on the false claim that they had stored solid wastes. They claimed the hearing was inadequate and the hearing officer was biased and unqualified.

The Fishbacks also raised section 1983 claims based on events occurring after the CIWMB board decision. They alleged that from March 2007 to July 2008, County agents conspired to harass them and undermine the CIWMB board decision by preventing them from qualifying for an exemption from the permit requirement. They sought damages and injunctive relief.

The County filed a motion for summary judgment alleging that the Fishbacks' dismissals of their section 1094.5 mandamus petitions barred their section 1983 civil rights action under the res judicata doctrine.

The Fishbacks submitted opposition declarations. They claimed the County agents refused to consider their engineering reports following the CIWMB board decision. They alleged the County granted "after the fact permits" to other land owners, but refused their request for such relief. (Underscoring omitted.) They contended that they had a right to file a section 1983 damage action for a pattern of bad faith conduct.

The trial court granted the County's motion. It found the failure to exhaust the section 1094.5 judicial remedy barred the section 1983 action. It entered judgment against the Fishbacks.

DISCUSSION

(The First Case)

Res Judicata/Collateral Estoppel Consequences of Dismissing the Mandamus Cases

The County contends the Fishbacks' dismissal of their administrative mandamus cases (§ 1094.5) constitutes a failure to exhaust their judicial remedies and bars their section 1983 action under the res judicata/collateral estoppel doctrine. The County is partly correct.

"[T]he responsibility for solid waste management is a shared responsibility between the state and local governments." (Pub. Res. Code, § 40001, subd. (a).) Both entities conduct administrative hearings to decide waste management issues and corrective action for solid waste violations. "[A] party 'aggrieved' by a decision and order issued by the Local Agency [the County] or the Waste Board [CIWMB] [may] file a petition for a writ of mandate for review of the decision." (*San Elijo Ranch, Inc. v. County of San Diego* (1998) 65 Cal.App.4th 608, 613; Pub. Res. Code, § 45042 [review is by section 1094.5 mandamus writs].) There are negative consequences for those seeking to challenge administrative hearing findings without exhausting these remedies.

"[W]here an administrative tribunal has rendered a quasi-judicial decision which could be challenged by administrative mandamus pursuant to Code of Civil Procedure section 1094.5, a party's failure to pursue that remedy may collaterally estop a federal civil rights action." (*Mola Development Corp. v. City of Seal Beach* (1997) 57

Cal.App.4th 405, 410.) "This "is a form of res judicata, of giving collateral estoppel effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action."" (Ibid.)

The Fishbacks dismissed their section 1094.5 petitions before the superior court could rule on their challenges to the hearing officer decision and the CIWMB board decision. They claim the dismissals have no significant impact on their section 1983 action. But they failed to exhaust their judicial remedies. "With the voluntary dismissal[s], it was 'as though no [mandamus] action had ever been filed.'" (*Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at p. 414.) They are considered to have "obtained no determination in [their] favor" in the administrative proceedings. (Ibid.) The administrative decisions are "res judicata on all issues that were or could have been raised in a successful challenge through administrative mandamus." (Id. at p. 411.)

Consequently, several claims raised in the Fishbacks' section 1983 action are barred. These include their claim that the County hearing was procedurally unfair and the decision was invalid because: 1) the hearing officer lacked the qualifications to decide the case, 2) he should have been disqualified because he had conflicting enforcement duties, 3) there should have been a hearing panel instead of a single decision maker, and 4) the hearing officer misstated the facts and the law. These challenges may not be relitigated in a section 1983 action because they could have been raised in the mandamus action. "Mandamus proceedings allow courts to flesh out the issues and factual components of the dispute, including issues of procedural fairness." (*Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at p. 411.) Parties who do not use the section 1094.5 remedy may not review the administrative decision through an alternative "procedural end run." (*Du Four v. Unemployment Ins. Appeals Bd.* (1975) 49 Cal.App.3d 863, 866, fn. 2.) This state policy does not conflict with the federal Civil Rights Act. (*Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 646-647.)

In their section 1983 action, the Fishbacks alleged their 2005 and 2006 activities were exempt from regulation and the materials they used did not constitute solid waste when the CDO was issued. But they raised these issues in their section 1094.5 petitions to review the hearing officer's decision and the CIWMB board decision. In their section 1983 action, they alleged the CDO was unlawful. But the CIWMB board upheld the CDO and they challenged the CDO in their section 1094.5 petition to review that decision. Consequently, the dismissals bar relitigation of these issues. (*Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at pp. 411, 414.)

The trial court correctly relied on collateral estoppel to bar section 1983 claims based on the alleged invalidity of the enforcement actions that arose before and including February 20, 2007- the date the Fishbacks filed their second section 1094.5 writ. These included: 1) the County's May 2005 "Notice of Unauthorized Grading"; 2) an April 12, 2006, "solid waste" determination; 3) the County's 2006 solid waste enforcement orders; 4) the County's 2006 administrative proceedings enforcing those orders; 5) a July 5, 2006, "Notice of Grading Non-Compliance"; and 6) a November 22, 2006, "Determination of Violation of the Hillside Erosion Ordinance" notice. These issues were either raised or could have been raised in their section 1094.5 writs.

In the section 1983 action, the Fishbacks alleged that in 2005 and 2006 they were treated "disparately" from others. But the same claim was made at the County administrative hearing. In their section 1983 action, they alleged that in 2006 County agents were "misapplying relevant statutory provisions" to subject them to solid waste sanctions. The Fishbacks made the same allegation in their section 1094.5 writ petition. "There can be no justification" for not litigating these claims "as reasons" to support their section 1094.5 writs and challenge the administrative findings. (*Briggs v. City of Rolling Hills Estates, supra*, 40 Cal.App.4th at p. 646.) Because the Fishbacks elected to proceed by way of administrative appeals, the dismissal of their section 1094.5 writs bars section 1983 relief for these claims. (*Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at p. 411; *Briggs*, at pp. 646-647.)

Res Judicata/Collateral Estoppel Exception for Solid Waste Administrative Cases

The Fishbacks contend the res judicata/collateral estoppel doctrine does not apply to County's waste management administrative hearings because those proceedings are not sufficiently "judicial in character." We disagree.

Administrative proceedings often have less formal procedures than court trials. But "the absence of formal trial procedures has not historically prevented California courts from according preclusive effect to administrative decisions." (*Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at p. 412.)

The County notes that Ordinance No. 4258, which governs the procedure for solid waste administrative hearings, complies with due process requirements. It provides for: 1) notice of claimed violations, 2) the right to appeal, 3) the right to have "all live testimony at the hearing to be taken under oath if requested by . . . any affected person," 4) the right to have subpoenas and subpoenas duces tecum issued, 5) the right to have a transcript of the hearing, 6) the right to a ruling "supported by the weight of the evidence," and 7) the right to pursue a section 1094.5 mandamus writ to review the decision. Moreover, the Fishbacks could have raised the alleged deficiency of the administrative hearing in their section 1094.5 writs. Their failure to exhaust that judicial remedy precludes them from challenging the fairness of that proceeding. (*Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at p. 411.)

Claims Arising After the Filing of the Last Section 1094.5 Mandamus Writ

The Fishbacks contend their section 1983 action involves some events that took place after the filing of their second section 1094.5 mandamus petition. The res judicata/collateral estoppel doctrine does not bar litigation for these new claims.

"As a cause of action is framed by the facts in existence when the underlying complaint is filed, res judicata 'is not a bar to claims that arise after the initial complaint is filed.'" (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 227.) "For this reason, the doctrine may not apply when

'there are changed conditions and new facts which were not in existence at the time the action was filed' (*Ibid.*)

The Fishbacks' section 1094.5 petition to review the CIWMB board decision was filed on February 20, 2007. But some of the events in the Fishbacks' section 1983 action involves events that occurred after February 20, 2007. The Fishbacks claim the County: 1) did not comply with the CIWMB board decision, 2) refused to consider the Fishbacks' evidence for an exemption, 3) violated due process by not allowing the Fishbacks to appeal a notice of violation, and 4) was "trespassing on [their] Land." The County contends these claims lack merit. But it acknowledges that the trial court did not reach the merits. Instead, it incorrectly ruled these new claims were barred by res judicata or collateral estoppel.

The County notes that the CIWMB board decision ordered the Fishbacks to "comply" with the CDO. But it also ordered County "to review any information that Fishback submits to show that his activity fits within the Excluded or Enforcement Agency Notification Tier, and if he does, allow compliance with the [CDO] through this lesser level of regulation (i.e. not require a solid waste facility permit)." It said, "In upholding the [CDO], the Board Members are not denying Fishback the right to show he is not a disposal site, they are simply requiring him to follow the rules that set forth the requirements for showing that he is not." The board did not place a time limit on these orders and the compliance issue was not fully resolved by its decision. The board did not resolve whether the County improperly rejected a permit exemption in 2007 and 2008.

The County suggests the section 1983 claims arising after the filing of the section 1094.5 petitions are barred because they were not initiated in a land use administrative proceeding. But the Fishbacks claimed they sustained damages by being subject to a conspiracy by biased local authorities who 1) vindictively discriminated against them, 2) refused to let them to exercise due process appeal remedies, and 3) retaliated by frustrating their efforts to obtain the relief allowed by a CIWMB board decision.

These are civil rights damage claims for an alleged pattern of bad faith conduct under color of law. (*Carpinteria Valley Farms, Ltd. v. County of Santa Barbara* (9th Cir. 2003) 344 F.3d 822, 830-831; *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 563-565; *Esmail v. Macrane* (7th Cir. 1995) 53 F.3d 176, 179.) They are independent from claims initiated in the land use administrative setting. (*Carpinteria Valley Farms, Ltd.*, at pp. 830-831[civil rights claims based on "vindictive action," "ill will" and retaliation are ripe unlike section 1983 claims based on "faulty zoning" decisions or "as applied" or "regulatory" takings which may be subject to exhaustion requirements]; *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618, 1622; *Edmundson v. Borough of Kennett Square* (3rd Cir. 1993) 4 F.3d 186, 193.)

These damage claims may be initiated in court without exhausting an administrative remedy because the "injuries . . . have already occurred and do not depend on the finality of the County's determination of the permissible uses of [the plaintiff's] property." (*Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, supra*, 344 F.3d at p. 831, italics omitted; *Harris v. County of Riverside* (9th Cir. 1990) 904 F.2d 497, 501; see also *Nasierowski Bros. Inv. v. City of Sterling Heights* (6th Cir. 1991) 949 F.2d 890, 894 [claims relating to the infirmity of the process are "instantly cognizable"].)

Consequently, "we may not deny plaintiffs the right to a judicial action . . . by imposing a requirement that the plaintiff . . . exhaust state remedies before filing a section 1983 action." (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 340-341.) "[T]he intent of Congress [is] that there be no state-created barriers to [such actions]." (*Id.* at p. 341, fn. 10; *Felder v. Casey* (1988) 487 U.S. 131, 142 [It "never intended that those injured by governmental wrongdoers [must] . . . submit their claims to the government responsible for their injuries"]; *Burnett v. Grattan* (1984) 468 U.S. 42, 50 [these causes of action "are judicially enforceable in the first instance"]; *Patsy v. Board of Regents* (1982) 457 U.S. 496, 501; *White v. State of California* (1987) 195 Cal.App.3d 452, 466 ["a state administrative remedy does not ordinarily foreclose resort to section 1983"]; *Logan v.*

Southern Cal. Rapid Transit Dist. (1982) 136 Cal.App.3d 116, 124; *Plano v. Baker* (2nd Cir. 1974) 504 F.2d 595, 599.)

Moreover, "[n]o rule of exhaustion of administrative remedies precludes prosecution of a civil claim without resort to an administrative procedure which is irrelevant to the claim." (*Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406, 410, italics omitted.) When the Fishbacks filed their section 1983 action, they were no longer challenging the CIWMB board decision or seeking a mandamus review of the hearing officer's decision. (*McDaniel v. Board of Education, supra*, 44 Cal.App.4th at p. 1622 [exhaustion requirement did not apply where section 1983 plaintiff was not challenging an administrative hearing decision].)

Instead, the Fishbacks sought damages for an alleged *pattern* of bad faith unconstitutional conduct, retaliation, conspiracy, trespassing, and an injunction. Such relief cannot be decided in an administrative setting. (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 456; *Brosterhous v. State Bar, supra*, 12 Cal.4th at p. 333 [arbitrator may not resolve section 1983 issues or enjoin "constitutional" violations]; *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1178 [commission may not decide constitutional issue]; *State of California v. Superior Court* (1974) 12 Cal.3d 237, 251 [agency may not decide "constitutionality" of its proceedings]; see also *South Lyme Property Owners Assn., Inc. v. Town of Old Lyme* (D. Conn 2008) 539 F.Supp.2d 524, 536 ["Administrative agencies generally do not have the power to grant the injunctive, declaratory or monetary relief" sought by section 1983 plaintiffs]; *Edmundson v. Borough of Kennett Square, supra*, 4 F.3d at p. 193 [agency may not "issue binding pronouncements in the area of federal constitutional law"]; *Plano v. Baker, supra*, 504 F.2d at p. 599 [only courts may decide section 1983 conspiracy and injunctive claims].)

In addition, the Fishbacks' trial counsel claimed they had a state statutory right to elect to initiate claims that occurred after the CIWMB board decision in court. This contention has merit. Former Public Resources Code section 45033, which was in

effect in 2008 when the section 1983 claims were filed, provided, "*A failure to appeal to the hearing panel, the hearing officer, or the board for review . . . does not preclude a person from filing an action with the superior court to contest any action or inaction of the local enforcement agency*" (Italics added.) This section provides a party with an election of remedies. (*McKee v. Bell-Carter Olive Co.* (1986) 186 Cal.App.3d 1230, 1240.) It allowed the Fishbacks to either proceed to an administrative hearing or "go straight to court." (*Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1464-1465 [section 1983 claimant had election of remedies option]; *McKee*, at p. 1240; see also *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573, 582 ["The Waste Act review process is arguably permissive, rather than a mandatory administrative appeal that is a precondition to judicial review"].)

"[W]here a statute provides an administrative remedy and also provides an alternative judicial remedy *the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him by the same statute, elects to use the judicial one.*" (*McKee v. Bell-Carter Olive Co.*, *supra*, 186 Cal.App.3d at p. 1240, italics added.) Consequently, the merits of these section 1983 claims arising after February 20, 2007, remain to be decided. The trial court erred by barring them.

The Order Granting Summary Adjudication on the County's Action
(*The Second Case*)

The County filed a complaint against the Fishbacks to enforce a corrective action order to require them to remove material from their property. The first cause of action was for declaratory and injunctive relief. In the second cause of action, the County sought civil damage penalties. The County moved for summary judgment/summary adjudication. On August 15, 2011, the trial court issued a minute order stating, "It was the court's intention to grant the motion for summary adjudication as to the County's first cause for *declaratory relief.*" (Italics added.)

The Fishbacks have appealed from this minute order. But "[u]nder the one final judgment rule, 'an appeal may be taken only from the final judgment in an entire action.'" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756.) Here the trial court did not rule on injunctive relief or the second cause of action. No judgment was entered. "An order granting summary judgment is not an appealable order; the appeal is from the judgment." (*Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 288.) The minute order is not a final judgment. "The law is established in California that an appeal does not lie from a minute entry" (*Smith v. Smith* (1941) 45 Cal.App.2d 212, 213.) The trial court may change or modify that order until the final judgment is entered in the County's action. (*Id.* at p. 214.) This appeal is not ripe and it is dismissed.

DISPOSITION

The judgment dismissing the Fishbacks' section 1983 action in the first case (Case No. CIV 244304) is reversed. The appeal from the summary adjudication order on the County's action in the second case (Case No. 56-2009-00354044-CU-MS-SIM) is dismissed. Each party shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Walsh, Judge
Superior Court County of Ventura

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